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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 70

KENNETH J. TOBIN and MARGUERITE R. TOBIN,

Petitioners,

v.

LAURIE W. TOMLINSON, District Director of Internal Revenue, District of Florida,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on November 21, 1962.

OPINIONS BELOW

The order granting the Respondent's motion for summary judgment and final order dismissing Petitioners' complaint in

this cause entered by the District Court on February 18, 1961, is reported in 192 F. Supp. 139, and is also set forth in the record, pages 35 and 36. The opinion of the Court of Appeals entered on November 21, 1962, has not yet been officially reported, but is unofficially reported by Commerce Clearing House in 1962-U.S.T.C. §9827 (Appendix A, infra p. 1).

JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1962 (Appendix B, infra, p. 11). The jurisdiction of this Court is invoked under 28 U.S.C.A. ¶1254.

QUESTION PRESENTED

Whether or not a taxpayer may file a valid claim for refund of personal income tax, pursuant to the provisions of Public Law 629 (retroactively amending Section 117 of the 1939 Code, effective for taxable years beginning after May 31, 1950) with respect to the taxable year 1952, which year was otherwise subject to the bar of the statute of limitations prescribed by Section 322(b)(1) of the 1939 Code at the time of enactment of the retroactive and remedial statute.

STATUTES INVOLVED

The statutory provisions directly involved are Public Law 629, c. 464, ¶1 70 Stat. 404, enacted June 29, 1956 (26 U.S.C. Appendix, 1952 Ed Supp. IV, Sec. 117, and Sec. 322(b)(1) of the Internal Revenue Code of 1939, as are set forth in Appendix C, infra, pp. 13 to 14).

STATEMENT

This case involves a claim for refund filed by Petitioners for a portion of their Federal income tax paid by them with respect to their return for the calendar year 1952. The Petitioners, in filing their return for 1952, included certain royalty payments in the amount of $7,238.42, as ordinary income, and their tax for said year was computed in accordance therewith.

Following the enactment of Public Law 629, Petitioners filed a claim for refund on October 11, 1956, for the calendar year 1952, seeking a partial refund of the tax paid by them in accordance with their original return.

The claim for refund for 1952 was filed by Petitioners on the theory that the patent royalties which they had reported as ordinary income were legally and properly taxable to them as long-term capital gain, as expressly provided for by Public Law 629, approved on June 29, 1956, retroactively amending Section 117 of the Internal Revenue Code of 1939 for all taxable periods beginning after May 31, 1950.

Public Law 629 was a retroactive tax relief measure, which was applicable by its express terms to taxable years which were otherwise barred by the statute of limitations prescribed by Section 322(b)(1) of the 1939 Code at the time the relief act was enacted into law.

After the lapse of more than six months from the date of the filing of the claim for refund for 1952, Petitioners instituted a suit for refund by the filing of a complaint in the United States District Court for the Southern District of Florida at Jacksonville, Florida.

The Government filed a motion to dismiss the Petitioners' complaint on January 14, 1958, and the District Court entered an order on February 7, 1958, granting the Government's motion to dismiss, with leave to the Petitioners to file an amended complaint. The Petitioners filed an amended complaint on February 14, 1958, by which Petitioners attempted to raise an issue as to whether or not certain letters which had been addressed by them to the Internal Revenue Service with respect to their 1952 tax return constituted an informal claim for refund upon which the relief sought could be granted.

The Respondent filed an answer to the amended complaint on March 31, 1958, and, following the filing of Petitioners' motion to strike portions of the Government's answer and motions for summary judgment on behalf of both parties, the District Court on February 18, 1961, entered a final order granting the Respondent's motion for summary judgment, and dismissing the Petitioners' complaint.

Petitioners then appealed to the United States Court of Appeals for the Fifth Circuit, which resulted in an affirmance of the order and judgment of the District Court, on November 21, 1962 (Appendix A, p. 1).

Prior to the filing of the suit for refund involving the calendar year 1952, the Petitioners filed a similar claim under an identical theory for the calendar year 1951. Following the filing of the claim for refund for the taxable year 1951, Petitioners also entered suit in the United States District Court for the Southern District of Florida at Jacksonville, Florida. Following an adverse decision of the District Court, Petitioners prosecuted an appeal to the United States Court of Appeals for the Fifth Circuit, which was also decided adversely to them on March 25, 1959, in the case of *Tobin v. United States*, 264 F.2d 845. The Sixth Circuit, in *United States v.*

Dempster, 265 F.2d 666 (cert. den. 361 U.S. 819) in a per curiam decision, adopted and followed the decision of the Fifth Circuit in *Tobin v. United States*, supra.

All of these cases involved the same issue, namely, whether or not taxpayers can file claims for refund under Section 117(q), as retroactively amended by Public Law 629, with respect to taxable years, which were otherwise barred under the three-year statute for the filing of claims for refund, as set forth in Section 322(b)(1) of the 1939 Code.

Subsequent to the Fifth Circuit's first opinion in *Tobin v. United States*, supra, and prior to the entry of its decision in this cause on November 21, 1962, the Court of Claims, in *Zacks v. United States*, 280 F.2d 829, (July 15, 1960) held in an identical case directly contrary to the holding of both the Fifth and Sixth Circuits with respect to the issue involving the retroactive application of Public Law 629 and the statute of limitation factor.

Although the opinion of the Court of Claims in the *Zacks* case was entered on July 15, 1960 the final judgment in the case was not entered until July 6, 1962.

The Court of Claims in the *Zacks* case held, in effect, that a taxpayer can file a legally valid claim for refund under Section 117(q) (Public Law 629) of the Internal Revenue Code of 1939, with respect to taxable years beginning after May 31, 1950, notwithstanding the fact that the normal three-year statute of limitations prescribed by Section 322(b)(1) for the filing of claims had expired at the time of the passage of the relief statute on June 29, 1956, and the date the claim was filed.

Following the entry of final judgment in favor of the taxpayer in the *Zacks* case, the Government, on or about December 3, 1962, filed a petition for writ of certiorari to the

United States Court of Claims in the matter of *United States of America v. Aaron Zacks and Florence Zacks*, Supreme Court of the United States, No. 632, October Term 1962.

Under the reasons for the granting of the writ, urged in the Government's petition, it is stated: "The decision of the Court of Claims in this case is in conflict with the decision of the Fifth Circuit in *Tobin v. United States*, 264 F.2d 845, and the Sixth Circuit, per curiam, in *United States v. Dempster*, 265 F.2d 666, certiorari denied, 361 U.S. 819."* Also in a footnote the Government refers to the fact that the Fifth Circuit in the instant case, in an opinion rendered November 21, 1962, has adhered to its original decision involving the question of the retroactive application of Public Law 629.

This Court, on January 14, 1963, has entered its order granting the Government's petition for writ of certiorari in the *Zacks* case.

REASONS FOR GRANTING WRIT

1. The decision of the United States Court of Appeals in this case and the earlier case involving the same issue and parties, *Tobin v. United States*, 264 F.2d 845, is in direct and irreconcilable conflict with the opinion and decision of the United States Court of Claims rendered in the case of *Zacks v. United States*, 280 F.2d 829.

2. Inasmuch as the Court has entered an order granting the Government's petition for writ of certiorari in the *Zacks* case, it is submitted that it is only proper and fair that the Court enter an order granting Petitioners' petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this cause, toward the end that a final disposition

* Pet. for writ of certiorari, **U. S. v. Zacks**, No. 632, Supreme Court, October Term 1962, p. 6

can be made by this Court as to the retroactive application of Public Law 629.

3. In further support of the reasons for the granting of the writ, the Petitioners suggest to the Court that it would materially sharpen the issue involved if their case is heard by the Court in a consolidated proceeding with the *Zacks* case.

4. Counsel for Petitioners assume that there will be no objections filed on behalf of the Government to the granting of this petition, in view of the Court's having already entered an order granting the Government's petition in the *Zacks* case on January 14, 1963.

5. Unless this Court enters an order granting Petitioners' petition for writ of certiorari, there will be no way in which their rights can be preserved with respect to the issue involved, in the event that the Court affirms the decision of the Court of Claims in the *Zacks* case.

CONCLUSION

For the foregoing reasons, it is submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

HILL AND FRAZIER

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ATTORNEYS FOR PETITIONERS

Dated: February 4, 1963

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19173

KENNETH J. TOBIN and MARGUERITE R. TOBIN,

Appellants,

versus

LAURIE W. TOMLINSON, District Director of Internal Revenue, District of Florida,

Appellee.

Appeal from the United States District Court for the Southern District of Florida, Jacksonville Division.

(November 21, 1962)

Before RIVES, JONES and GEWIN, Circuit Judges.

RIVES, Circuit Judge: Kenneth J. Tobin, who will here generally be called the taxpayer, made an assignment of a patent reserving royalties. He filed an income tax return for the year 1954 reporting the royalties for that year as

ordinary income. After the enactment of Public Law 629, 84th Cong. 2d Sess., approved June 29, 1956, retroactively amending Section 117 of the Internal Revenue Code of 1939,[1] the taxpayer brought suit to recover a claimed overpayment. Against a defense that the claim was barred by limitations[2] and by failure to file a timely claim,[3] the taxpayer contended that the retroactive amendment to Section 117, supra, took the claim out from the limitation statute governing taxes and entitled taxpayer to the benefit of the general six-year limitation period.[4] In the alternative it was urged that the 1956 amendment created a right of refund not previously existing and the limitation period did not begin to run until the passage of the Act. These contentions, as to the 1951 tax, were resolved by this Court against the taxpayer. *Tobin v. United States*, 5 Cir., 1959, 264 F. 2d 845.

The taxpayer again reported his royalties as ordinary income in his tax return for the year 1952. He again brought suit and the district court dismissed the cause. *Tobin v. Tomlinson*, D.C.S.D. Fla. 1961, 192 F. Supp. 159. The same questions were

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"(1) General Rule. — A transfer (other than by gift, inheritance, or devise) of property, consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder, shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are —

"(A) payable periodically over a period generally coterminous with the transferee's use of the patent, or

"(B) contingent on the productivity, use, or disposition of the property transferred.

"(4) Applicability. — This subsection shall apply with respect to any amount received or payment made, pursuant to a transfer described in paragraph (1) in any taxable year beginning after May 31, 1950, regardless of the taxable year in which such transfer occurred." 26 U.S.C.A. § 117 (q) (1), (4).

[2] 26 U.S.C.A. (I.R.C. 1939) § 322 (b) (1).

[3] 26 U.S.C.A. (I.R.C. 1954) § 7422.

[4] 28 U.S.C.A. § 2401.

raised as were presented on the former appeal. As to those questions we adhere to the former opinion of the Court and we need not again state the reasons for the conclusions there reached.

A further question not before the Court on the former appeal is whether or not a letter sent by the taxpayer to the Collector of Internal Revenue on March 10, 1953, constitutes an informal claim for refund which was perfected by the filing of the formal claim on Treasury Form 843 on October 11, 1956, so as to avoid the running of the statute of limitations. An Internal Revenue Agent replied to the taxpayer's letter of March 10, and correspondence continued for several months, the last letter from the Agent to the taxpayer being dated July 1, 1955. The Agent took and adhered to the position that

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"In filing the attached income report for 1952 and the Declaration of Estimated Tax for 1953 may I call your attention to the fact that I have simiritired (sic) and will live here from now on. Last year and subsequent years I filed my reports in Chicago, Illinois and have advised that office of the change.

"Further my type of receiving income has been changed. I shall receive a small consulting fee and the balance of my income shall be from patent royalties as a result of exclusive license with the Evans Products Company.

I have retired because I find no percentage in keeping on and having the government collect the greater part of my income from royalties when they are considered as straight income. I lose and the government loses in taxes.

"I have been advised by competent legal talent that I should under the circumstances treat my royalties as Capital Gain. By the same token I have no idea any more than you do what to estimate as income inasmuch as the inventions are used by the railroads and the armed forces in transportation but I am giving a guess anyway. I have paid the tax on the royalties as straight income and I ask that you arrange a hearing on this matter in the Tax Court and advise me.

"A recent Appeals Court Ruling and opinion of the United States Supreme Court are attached herewith for your information. After it has served your purpose will you kindly return it to me. It was taken for the (sic) The New York Times, Sunday, February 1st, 1953.

"I am requesting that my royalties be subject to tax as Capital Gains and that I be refunded the amount of tax being paid on it as ordinary income. I am prepared to furnish all the necessary supporting data.

the royalties were ordinary income. There the matter rested until October 5, 1956 when the taxpayer signed a claim for refund on Form 843, which was filed in the office of the District Director at Jacksonville, Florida, on October 11, 1956.

The claim on Form 843 does not purport to amend or perfect any prior informal claim, and contains no reference to any other claim. The Form 843 claim for refund refers to an attached "Statement of Reasons for Allowance of Claim" in which it is stated:

> "In support of the foregoing contents, Claimant relies on the expressed provisions of Public Law 629, 84th Congress, Second Session, Chapter 464, HR 6143, approved June 29, 1956, retroactively amending Section 117 of the Internal Revenue Code of 1939, to all taxable periods beginning after May 31, 1950."

The original complaint filed by the taxpayer alleged:

> "That on or about October 11, 1956, Plaintiffs filed a Claim for Refund, Form 843, with and in the office of the District Director of Internal Revenue for the District of Florida at Jacksonville, Florida, seeking a refund of $3,655.52 of taxes aggregating $7,238.42, paid by Plaintiffs with respect to their original 1952 income tax return, a true copy of which is marked Exhibit A, attached hereto and by reference made a part of this Complaint."

Attached to the complaint was a verbatim copy of the claim on Form 843. The defendant moved to dismiss the complaint upon the grounds that it appears upon the face of the complaint that the plaintiffs failed to file a claim for refund as provided by Section 322 (b) of the Internal Revenue Code of

1939, in that the claim was not filed within three years of the filing of the return or within two years of the payment of the tax." The district court granted the defendant's motion to dismiss with leave to the plaintiff to file an amended complaint. Then in an amended complaint filed February 14, 1958, the plaintiff for the first time took the position "that the various claims and demands made by the said Kenneth J. Tobin in letters addressed to the Bureau of Internal Revenue and Internal Revenue Service and replies of the Government agents thereto between the dates of March 10, 1953, and July 1, 1955, constitute a legally sufficient proper and timely Claim for Refund necessary as a condition and precedent of maintaining this cause of action under the provisions of Section 3772 (a) (1) and other relevant provisions of the Internal Revenue Code of 1939."

That position the district court "found to be without substance." 192 F. Supp. 160.

Section 7422 (a) of the 1954 Internal Revenue Code prohibits the maintenance of a refund suit in any court "until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof."

The applicable regulations, thus sanctioned, provide as follows (Treasury Regulations 118, Sec. 39.322-3):

> "Sec. 29.322-3. *Claims for refund by taxpayers.*
>
> "(a) Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, or on Form 1040 or 1040A, or an amended return.

and should be filed with the district director of internal revenue. A separate claim shall be made for each taxable year or period.

"(b) . . . The claim must set forth in detail each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. The statements of the grounds and facts must be verified by a written declaration that they are made under the penalties of perjury . . ."

The taxpayer's letters did not comply with the regulations either as to form or as to substance. Nor were they verified or declared to be made under penalties of perjury.

"Literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the Collector or the United States." *Tucker* v. *Alexander*, 1927, 275 U. S. 228, 231.

See also *United States* v. *Felt & Tarrant Co.*, 1931, 283 U. S. 269, 272.

" . . . But it is not enough that somewhere under the Commissioner's roof is the information which might enable him to pass on a claim for refund. The protection of the revenue authorizes the Commissioner to demand information in a particular form, and he is entitled to insist that the form be observed so as to advise him expeditiously and accurately of the true nature of the claim." *Angelus Milling Co.* v. *Commissioner*, 1945, 324 U. S. 293, 299.

In *United States v. Kales*, 1941, 314 U. S. 186, 196, there was "consistent administrative treatment of respondent's letter of March 23, 1925, and the later amendment as a claim for refund." 314 U. S. at 196. The Court held:

> "This Court, applying the statute and regulations, has often held that a notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim, where formal defects and lack of specificity have been remedied by amendments filed after the lapse of the statutory period. *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62; *United States v. Factors & Finance Co.*, 288 U. S. 89; *Bemis Bro. Bag Co. v. United States*, 289 U. S. 28; *Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 374. This is especially the case where such a claim has not misled the Commissioner and he has accepted and treated it as such. *Bankit Teller & Co. v. United States*, 283 U. S. 258; *United States v. Memphis Cotton Oil Co.*, *supra*, 70." 314 U. S. at 194.

The taxpayer's claim for refund on Form 843 does not purport to be an amendment of an amendment of any informal claim. It cannot be asserted that the Commission has waived the requirement of a formal claim. What was said by Judge Hutcheson in *Livermore v. Miller*, 5 Cir., 1938, 94 F. 2d 111, 114, is applicable here:

> "But, if plaintiff intended these letters as an informal claim for refund, the collector did not so understand them. He filed them away as correspondence, and did not send them to the Commissioner as

> a claim, while the Commissioner certainly did not intend to receive or consider them as such, for, until the time allowed for filing her claim had long passed, he never saw or knew of them."

If the letters or any of them constituted a claim for refund, it was an informal and retective claim which "will not supply a basis for a suit against the Government when there has been neither waiver by the Commissioner nor amendment by the taxpayer." *United States* v. *Memphis Cotton Oil Co.*, 1933, 288 U. S. 62, 72.

Moreover, the assertions in the taxpayer's letters were rejected in the letter from the Internal Revenue Agent. Even if the letters were treated as a claim, th claim was not in existence after it was rejected and could not be amended after the expiration of the statute of limitations: 10 Merten's Law of Federal Income Taxation, §58.18, p. 43; and cases cited in Note 22, including *American National Ins. Co.* v. *Bass*, 5 Cir., 1934. 68 F. 2d 511.

The judgment of the district court was correct, and it is

AFFIRMED.

JONES, Circuit Judge, Dissenting in Part:

I am not in agreement with that part of the Court's opinion which holds that the taxpayer's letter which accompanied his return, together with the letters to and from the Internal Revenue Agent, did not constitute an informal claim for refund.

The rule as to informal claims is thus stated:

> "Letters and protests ordinarily do not meet the requirements of the statute, but where they are found to constitute 'more than a protest or a statement of an intention to file a claim late,' they have been accepted as informal refund claims." Mertens, Law of Federal Income Taxation, Ch. 58, p. 48, § 58.20.

The rule has been stated and restated by the Supreme Court. *United States* v. *Kales*, 314 U. S. 186, 62 S. Ct. 214, 86 L. Ed. 132; *Bonwit Teller & Company* v. *United States*, 283 U. S. 258, 51 S. Ct. 395, 75 L. Ed. 1018. See also *Rogan* v. *Ferry*, 9th Cir. 1956, 154 F. 2d 974; *United States* v. *The Lederer Terminal Warehouse Company*, 6th Cir. 1943, 139 F. 2d 679. The Court of Claims has thus stated the rule and the reason for it:

> "It has long been recognized that the failure to meet the formal requirements in regard to claims for refund is not necessarily destructive of a taxpayer's right to such refund where the Commissioner was not misled or deceived by the failure to file a formal claim. [Citations] The purpose of a claim for refund is to put the Commissioner on notice that a right is being asserted with respect to an overpayment of tax. [Citation] This notice must be given within the time required by the statutory limitation period or else the claim is barred. Such a rule prevents the assertion of stale claims which would be difficult or impossible to determine on their merits due to the passing of time. However, where the Commissioner has had notice from the very beginning of the taxpayer's claim to a refund of tax predicated on specific facts the very purpose of the limitation period has been served. [Citation]

"Necessarily each case must be decided on its own peculiar set of facts with a view towards determining whether under those facts the Commissioner knew, or should have known, that a claim was being made." *Newton v. United States*, 143 Ct. Cls. 299, 163 F. Supp. 619.

With this principle and the reasons given I am in accord.

In his letter the taxpayer said, "I am requesting that my royalties be subject to tax as Capital Gains, and that I be refunded the amount of tax being paid on it as ordinary income." What more could he have said on printed form, and how could it have been said more clearly? The Internal Revenue Service could not have entertained a doubt but that a claim was being asserted and the basis for it. Believing that the judgment of the district court should be reversed, I dissent.

APPENDIX B

United States Court of Appeals

For The Fifth Circuit

October Term, 1961

No. 19,173

D. C. Docket No. 3871—Civ-J

J. TOBIN and MARGAERITE R. TOBIN,

Appellants,

versus

LAURIE W. TOMLINSON, District Director of Internal Revenue, District of Florida.

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before Rives, Jones and Gewin, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellants, Kenneth J. Tobin and Margaerite R. Tobin, be condemned, in solide, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Jones, Circuit Judge, Dissents in Part."

November 21, 1962

Issued: Dec. 19, 1962

APPENDIX C

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 117. CAPITAL GAINS AND LOSSES

(q) (as added by Sec. 1 of the Act of June 29, 1956, c. 464, 70 Stat. 404) *Transfer of Patent Rights.* —

(1) *General Rule.* — A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such thansfer are —

(A) payable periodically over a period generally coterminous with the transferee's use of the patent, or

(B) contingent on the productivity, use or disposition of the property transferred.

(4) *Applicability.* — This subsection shall apply with respect to any amount received, or payment made, pursuant to a transfer described in paragraph (1) in any taxable year beginning after May 31, 1950, regardless of the taxable year in which such transfer occurred.

(26 U. S. C., Supp. V, Appendix 117.)

SEC. 322. REFUNDS AND CREDITS

(b) *Limitation on Allowance.* —

(1) Period or Limitation. — Unless a claim for credit or refund is filed by the taxpayer within three years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.